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14 November 2013

The Hon. Phillip Cummins
Chair, Victorian Law Reform Commission
Level 3, 333 Queen Street
MELBOURNE VIC 3000

Dear Mr Cummins

Jury empanelment review

Thank you for the opportunity to provide a submission to the Victorian Law Reform Commission (VLRC) in response to the consultation paper on jury empanelment in Victoria.

The role of the jury in criminal trials is one of the most important features of our criminal justice system and Victoria Legal Aid (VLA) welcomes the review. We are aware of the multiple purposes that juries serve by ensuring that justice is administered in accordance with community standards whilst also protecting the rights of an accused person. The process of jury empanelment has the capacity to both increase the community's faith in a fair and impartial judicial system as well as erode it, and is key to community confidence in an effective and open justice system.

VLA is the largest criminal defence agency in Victoria and our criminal law practice has extensive experience in criminal jury trials. Our submission is aimed at providing practical suggestions for improving the existing jury empanelment process in Victoria which, on the whole, we consider to be delivering on its central aims.

Peremptory challenges

VLA recognises the need for a jury to be representative of the community and that a jury panel should be, as far as possible, impartial given this is one of the fundamental concepts underpinning the conduct of a fair trial.

We consider that peremptory challenges are an essential part of the jury empanelment process and that changes do not need to be made to this aspect of the empanelment process. Peremptory challenges provide a critical opportunity for accused people to be directly involved in their trial and represents one of the fundamental safeguards against a jury that is, or is perceived to be, biased or unfairly constituted.

VLA is of the view that the pre-empanelment processes around selection and screening of jury pools ensures that the availability of six peremptory challenges does not substantially alter the representativeness of the jury or undermine the randomised selection process. On this basis, VLA recommends maintaining the current number of peremptory challenges.

Process for peremptory challenges

As foreshadowed above, VLA supports the current process of empanelling a jury, including the number of challenges available in criminal trials, and the challenge for cause provisions.

However, we do advocate for a more flexible approach to the way in which peremptory challenges can be made. Currently, the accused is required to voice challenges in open court. Many accused suffer from mental and physical health problems that impede their ability to voice a challenge. This can be a very stressful and intimidating task for those accused who are vulnerable or whose verbal presentation may act to prejudice them in the eyes of prospective jurors.

VLA recommends that provision be made in s39(3) of the *Juries Act 2000* (the Act) to allow an accused to elect for his or her defence practitioner to voice peremptory challenges on their behalf.

Crown stand asides

VLA further advocates that the effect of the Crown's right to stand aside should be the same as for peremptory challenges and that those jurors should not be put back into the ballot box. We recommend s38(3) be repealed to achieve this purpose. There is no reason for jurors who have been stood aside to be returned to the ballot box, whilst those who are challenged by the defence are not.

Panel by number or name

In comparison to other states and territories, the information about jurors that is available to the parties during empanelment in Victoria is limited.

The availability of more information would help defence practitioners to make more rigorous peremptory challenges; however we understand that the provision of any additional information needs to be balanced against privacy and security considerations. For this reason, VLA supports the current position of a judge having the option of directing that a jury panel be called by number rather than name in order to assure jurors that their privacy and security will be maintained.

In practice, judges have very different approaches when it comes to calling jurors by name or number. There is also a variation as to how judges interact with parties when making this decision. Some consult practitioners before making a decision and some don't. VLA is of the view that it would greatly assist practitioners if judges were uniformly required to provide oral reasons to practitioners for their decision to empanel by number prior to the commencement of the trial. This would ensure that practitioners and the accused could have confidence that the decision is based on reasoning relevant to concerns about juror security.

Additional Jurors

The importance of making sure that trials are not delayed or aborted cannot be understated given the resourcing implications for all parties, and the personal impact on both victims and accused.

VLA acknowledges the importance of s23 of the Act, which allows a court to empanel additional jurors where necessary in order to maintain jury numbers for the duration of lengthy trials. We agree with the commentary in the consultation paper, which indicates that additional jurors are

often aggrieved when they cannot see their task to its conclusion having participated in the trial to the point of verdict.

VLA recommends that additional jurors should be required to stay on for deliberations and contribute to the ultimate verdict. We consider this would best address the additional jurors' potential disenfranchisement with the jury process.

VLA believes that reducing a jury to less than ten as explored in the consultation paper would result in the integrity of a verdict being compromised, or at least give the impression of such to an accused and the community. The fewer jurors that are present the less representative the jury becomes and the more susceptible it becomes to bias or undue influence from more dominant jurors. This can compromise the quality of discussions and the negatively affect the decision making process. Given the fundamental role of a jury to an accused's trial (and often personal liberty) it would be unacceptable to allow a jury of less than ten to proceed to deliberations.

If you would like to discuss any of the above matters further, please contact Helen Fatouros, Director Criminal Law Services [redacted].

Yours faithfully

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BEVAN WARNER
Managing Director